

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.809 OF 2006

In

NOTICE OF MOTION NO.1121 OF 2005

In

SUIT NO.1655 OF 1994

Yogesh J. Mehta

: Appellant
(Orig.Defendant No.1)

V/s.

Suruchi Narayan Pethe & Ors.

: Respondents
(Resp.No.1-Orig.Plaintiff,
Resp.No.2-Orig.Deft.No.2,
Resp.Nos.3&4-Orig.Resp.1 & 2)

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Mr.A.G.Damle i/b. Mr.P.M.Shah for the appellant.

Mr.G.D.Utangale i/b. M/s.Utangale & Co., for respondent no.1.

Mr.Gaurav Kothari with Mr.Pankaj Jain i/b. M/s.O.P.Soni & Co., for respondent no.2.

Mr.P.P.Chavan i/b. Mr.V.M.Bhate for respondent no.3.

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CORAM : R.M.LODHA & S.A.BOBDE, JJ.

DATE : DECEMBER 6, 2006.

P.C.

We heard Mr.A.G.Damle, the counsel for the appellant, Mr.G.D.Utangale, the counsel for the respondent no.1, Mr.Gaurav Kothari, the counsel for the respondent no.2, and Mr.P.P.Chavan, the counsel for the respondent no.3.

2. The respondent no.1 is the original plaintiff. She

filed the suit against the present appellant (defendant no.1) and the present respondent no.2 (defendant no.2) for declaration that she is the exclusive owner of suit flat no.73 in Vaibhav Apartments Co-operative Housing Society Ltd., S.K. Bole Road, Dadar (West), Mumbai, and for various reliefs.

3. The plaintiff took out Notice of Motion at the time of filing of the suit. By the order dated 20.10.1995, the defendant no.1 was directed to pay the maintenance bills issued by Vaibhav Apartments Co-operative Housing Society Ltd. (for short the "society") directly to the society. By another order dated 27.8.1997, both the defendants were restrained from creating third-party rights or interest in the suit flat or disposing of or alienating or parting with possession of the suit flat.

4. On 31.3.2005 the plaintiff took out one more Notice of Motion, being Notice of Motion no.1121 of 2005, praying for the following reliefs:-

- "a) Pending the hearing and final disposal of the Suit, the Respondents be restrained by an Order and Injunction of this Hon'ble Court from in any manner transferring the suit flat No.73, Vaibhav Co-op. Housing Society Ltd., S.K. Bole Road, Dadar (West), Mumbai 400 028, in the name of the Defendants in any manner whatsoever;
- b) The Defendant No.1 be directed to forthwith pay to the Respondent No.1 the maintenance

charges in respect of the suit flat as per the Order dated 20/10/1995 passed by this Hon'ble Court;

- c) The Respondent No.2 be restrained by an Order and Injunction of this Hon'ble Court from declaring the Defendant No.1 as a deemed member of the Respondent No.1 in respect of suit flat;
- d) The Defendant No.1 be ordered and directed to pay to the Plaintiff a sum of Rs.15,000/- for using and enjoying the suit flat with effect from November, 1995 till disposal of the suit;
- e) Cost of the Notice of Motion be provided for;
- f) For such further and other orders be passed in the interest of justice and equity;"

5. According to the plaintiff, the necessity of taking out the aforesaid Notice of Motion for the reliefs afore-noticed arose in view of the communication dated 16.3.2005 from the Assistant Registrar, Co-operative Societies, Mumbai, to the Secretary of the society asking the society to refund the non-occupancy charges recovered from the defendant no.1.

6. By the impugned order dated 11.7.2006, the learned Motion Judge granted the Notice of Motion in terms of prayer clause (c). In other words, by the impugned order, the learned Motion Judge has restrained the Assistant Registrar, Co-operative Societies, Mumbai, from declaring the defendant no.1 as a deemed member of the society in respect of the suit flat. It is this order

which is under challenge in this appeal at the instance of the defendant no.1.

7. That the defendant no.1 is in occupation of the suit flat pursuant to the agreement dated 23.4.1991 entered into between him and the plaintiff is not in dispute. According to the defendant no.1, under the agreement dated 23.4.1991, the plaintiff had agreed to sell the suit flat to him. On the other hand, the case of the plaintiff is that the agreement dated 23.4.1991 is not an agreement for sale, but was executed only towards security. The nature of the agreement, obviously, shall be decided in the suit. The fact of the matter is that the 1st defendant is in occupation of the suit flat. On the application made by the defendant no.1 on 15.3.2004, the Assistant Registrar, Co-operative Societies, by order (communication) dated 16.3.2005 has directed the society to refund the non-occupancy charges recovered from the defendant no.1 under sub-rule 43(2)(3)(D) of the bye-laws. The society charged non-occupancy charges from the defendant no.1 as, according to them, the 1st defendant is not a member of the society. While dealing with the issue of non-occupancy charges, the Assistant Registrar noticed that the 1st defendant has applied to the society for membership in respect of the suit flat in the prescribed form with all papers, membership fee,

transfer fee and other fees, but the society did not act on the said application. The Assistant Registrar, in the circumstances, held that the defendant no.1 had become a deemed member of the society on the expiry of three months from the date of the application dated 22.11.1999. That the order (communication) dated 16.3.2005 has not been challenged by anyone until date is not in dispute. In this back-drop of facts, we find it difficult to agree with the finding of the learned Motion Judge that during the pendency of the appeal, the Assistant Registrar could not have directed the society to accept the defendant no.1 as a member. The order is definitely an encroachment on the power of the Registrar or for that matter, the Assistant Registrar to exercise the power conferred on them under the Maharashtra Co-operative Societies Act, 1960. The order passed by the learned Motion Judge is impermissible by virtue of section 163 of the Maharashtra Co-operative Societies Act as well. It is true that in the suit pending before this Court, the issue concerns the agreement dated 23.4.1991 under which the defendant no.1 claims right or interest in the suit flat, but based on the said agreement, during the pendency of the suit, there should not be any impediment for the 1st defendant to apply to the society for membership since the 1st defendant came into possession of the suit flat pursuant to the said agreement. It is

not going to prejudice the plaintiff because if she succeeds in the suit and gets declaration from this Court that the agreement dated 23.4.1991 is not an agreement of sale and, consequently, not entitled to remain in possession of the suit flat, obviously, the order of the co-operative authority directing the society to confer membership or otherwise would, ipso facto be rendered ineffective and the membership of the defendant no.1 would have no legal effect.

8. The appeal deserves to be allowed and is, accordingly, allowed. The impugned order dated 11.7.2006 is set aside. However, it is clarified that in the event of the plaintiff succeeding in the suit, his membership in the society shall automatically go. It is further clarified that by virtue of the order dated 16.3.2005 or any other order that may be passed by the co-operative authority shall not create an equity in favour of the defendant no.1 in any manner whatsoever.

R.M. LODHA, J.

S.A. BOBDE, J.